IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.M.JAMES

TUESDAY, THE 27TH MARCH 2007 / 6TH CHAITHRA 1929

CRL.A.No. 1045 of 2002()

ST.529/1998 of CHIEF JUDICIAL MAGISTRATE COURT, PALAKKAD

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APPELLANT:

M/S.SREE LAKSHMI KURIES & LOANS(P) LTD.,
PALAKKAD, REPRESENTED BY ITS MANAGER, M.HARIDASAN.

BY ADV. SRI.S.VIJAYAKUMAR

RESPONDENTS:

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1. SRI.M.GOVINDARAJ, S/O.MARIASWAMY,
SREEKRISHNA MANDIRAM, INDUSTRIAL ESTATE P.O.,
OLAVAKKOT, PALAKKAD.

2. STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY FOR R1, ADV. SRI.P.VIJAYA BHANU
SRI.TONY MATHEW
FOR R2, PUBLIC PROSECUTOR, SRI THOMAS JOHN AMBOOKEN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 27/03/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.M.JAMES, J.

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Crl.A.No.1045 of 2002 (D)

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Dated this the 27th day of March, 2007

J U D G M E N T

The appellant who is aggrieved, because of the dismissal of the complaint and acquittal of the accused, the first respondent, by the Chief Judicial Magistrate, Palakkad, in S.T.Case No.529/1998, is before this Court, through this appeal, after obtaining leave, challenging the acquittal.

2. The facts reveal that the first respondent was a subscriber to three chits conducted by the appellant. One was for an amount of Rs.50,000/-. It was bid by the respondent-accused on 20/12/1996. There were two chits for Rs.15,000/- each. The first respondent bid both these chits on 02/01/1997. However, the first respondent defaulted the payment of the subscriptions to all the above three chits, which were due, he being a successful bidder of those chits. Exhibit D1 series are the notices issued by the appellant to the first respondent, intimating him of the default and demanding the amount. Exhibit D2 series are the reply given by the first respondent-

accused to Exhibit D1 series communication. Exhibits D1 and D2 series show and establish, the transactions between the appellant and the first respondent, the bidding of the three chits by the first respondent and default of the instalments, due to the appellant in those three chits. Exhibit P1 is a cheque dated 02/04/1998 for an amount of Rs.53,005/-. Exhibit P2 is a cheque, dated 13/04/1998, for an amount of Rs.4,665/-. Both these cheques, when presented, were dishonoured. Therefore, Exhibit P5 lawyer notice was sent. Exhibit P7 is the reply notice. In it, the first respondent had conceded some amount is due to the appellant, but did not specifically say what exactly was the amount. However, the first respondent took a contention in the reply notice, Exhibit P7, that Exhibits P1 and P2 cheques were issued as a security, without entering any amount in them, and, therefore, Exhibits P1 and P2, may not be entertained. Hence, the appellant filed the complaint before the court below. On the strength of Exhibit P10 resolution passed by the Board of Directors of M/s Sree Lakshmi Kuries and Loans Private Limited, PW.1, the Manager of that firm had entered the box. He also got marked 10 documents. There was no evidence except the

marking of Exhibits D1 and D2 series from the side of the first respondent-accused. The learned Magistrate found that Exhibits P1 and P2 were issued as security and, therefore, holding that Section 138 of the Negotiable Instruments Act, in short 'the Act', was not attracted, dismissed the complaint and acquitted the accused.

3. I have heard the arguments advanced by both sides. The evidence available on record clearly show that the first respondent-accused had defaulted the premium, to be paid to the appellant, after bidding the three chits, as stated above. In Exhibit P7 also he concedes the same. Exhibit D2 series replies, further reveal the above said fact. The question now, therefore, arises is, whether, Exhibits P1 and P2 which is admittedly issued by the respondent as securities, could create any legal liability on the respondent-accused, and whether the complainant can fill up the signed blank cheque leaf, issued by the respondent and present it for encashment of the amount.

4. In **I.C.D.S vs.Beena Shabeer** [2002(3) KLT 218 (SC)], the Apex Court had an occasion to consider whether the cheque issued by a guarantor could be made use of by the

drawee under Section 138 of the Act. The court held that a cheque issued by a guarantor, as a security, also comes within 'any debt or other liability', as contemplated under Section 138 of the Act. Applying the same principle in this case, Exhibits P1 and P2, having been issued by the first respondent himself, I hold that though they were signed and given by the first respondent as security, and in case of default of payment, the appellant is entitled to fill up the cheques for the due amount and present it for encashment. This view had been reiterated in **Lillykutty v. Lawrance** [2003(3) KLT 721], wherein it was held that the payee is entitled to fill up the cheque signed and delivered to the holder, and unless the contrary is proved, a presumption can be made that every negotiable instrument was made for consideration. In the case at hand, in the light of Exhibits D2 series and Exhibit P7, the first respondent having defaulted the payment towards three chits of the appellant, amounts are due to the appellant. Therefore, Exhibits P1 and P2, though they were issued as security, are liable to be proceeded against the drawer, the first respondent-accused under Section 138 of the Act. However, it is for the accused to

prove whether the amount stated in the cheques are due to the appellant or not and thus rebut the presumption as per the law of preponderance of probabilities. No evidence is adduced or circumstances are available in favour of the accused.

5. In view of the above position of law, the learned Magistrate was not legally right in dismissing the complaint and acquitting the accused. In the result, I set aside the impugned judgment dated 27/03/2002 in S.T.Case No.529/1998. I hold that the appellant had established a case under Section 138 of the Act, against the first respondent-accused and, therefore, I find him guilty. Hence, I convict him under Section 138 of the Act. The first respondent-accused has to be heard before a sentence is imposed on him. Instead of summoning him before this Court and questioning him, I am of the view that it is expedient to send back the case to the court below. Therefore, I restore S.T.Case No.529/1998 to the file of Chief Judicial Magistrate, Palakkad. The parties shall appear before the court below on 15/05/2007.

6. On the appearance of the first respondent-accused, the learned Magistrate shall hear the respondent on

the question of sentence, and impose the sentence on him, as per the law.

7. I make it clear that in the event of the appellant compounding the matter with the first respondent-accused, under Section 147 of the Act, the learned Magistrate shall pass appropriate orders, according to the law. In case of any failure of the first respondent-accused to appear, as directed herein above, the learned Magistrate shall take coercive steps to get his presence. The learned Magistrate shall dispose of the case, within two months from the date of appearance/production of the respondent-accused, before the court below.

The appeal is allowed as above.

(J.M.JAMES)
Judge

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J.M.JAMES, J.

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Crl.A.No.1045 of 2002 (D)

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J U D G M E N T

27th March, 2007